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SENG HUAT HANG SDN. BHD.

v.

CHEE SENG & CO. SDN. BHD.

HIGH COURT MALAYA, PENANG

EDGAR JOSEPH JR. J

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[CIVIL APPEAL NO. 60 of 1982]

1 JUNE 1985

CIVIL PROCEDURE: *Default judgment - Application to set aside - Test applicable.**c*

The respondent was given judgment in default in its favour, giving possession of certain premises occupied by the appellant to the respondent. The application by the appellant to set aside the judgment was dismissed by the learned President on the grounds that the Counsel for the appellant was absent during the trial and that the explanation given was unsatisfactory.

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The appellant appeals to set aside the default judgment on the ground that it had an oral tenancy entitling it to occupy the said premises so long as the respondent was able to acquire a Temporary Occupation Licence and or the right to remain at the said premises from the State Government of Penang. However, this oral tenancy was unsupported by any affidavit.

Held:*e*

[1] To set aside the default judgment, there must be evidence in the Court below disclosing a *prima facie* defence to the plaintiff's (respondent's) claim for possession.

[2] Since neither Counsel's affidavit nor the statement of defence was evidence showing a *prima facie* defence, the appeal was dismissed with costs on this ground alone.

[Appeal dismissed with costs.]

Cases referred to:*f*

Shaharudin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd. [1982] 2 MLJ 77; [1982] CLJ (Rep) 747

Pakrisamy v. Janagi [1970] 2 MLJ 202

Safety Insurance Co. Ltd. v. Hua Seng Electric Co. [1968] 1 MLJ 273

Gan Kim Kiat Bros. Realty Sdn. Bhd. v. Leong Ah Kau [1983] 1 MLJ 351; [1983] CLJ (Rep) 558

Drayton Giftware Ltd. v. Varyland Ltd. [1982] 132 NLJ 558

Farden v. Richter [1889] 23 QBD 124

Evans v. Bartlam [1937] AC 473

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Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors. [1985] CLJ (Rep) 575

Legislation referred to:

Subordinate Courts Rules 1980, O. 19 r. 3(1), O. 28 r. 8(1)

For the appellant - Wong Hoong Yin; M/s. Wong Hoong Yin & Co.

For the respondent - S.P. Annamalai; M/s. Annamalai & Co.

*h***JUDGMENT****Edgar Joseph Jr. J:**

At the conclusion of the arguments yesterday, I dismissed this Appeal and would now state my reasons for having done so.

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The appellant (the defendant in the Court below) had applied unsuccessfully to set aside a default judgment, giving possession of certain premises known as Godown No. 121, Weld Quay Foreshore, Penang ("the premises") occupied by it, to the respondent (the plaintiff in the Court below), both parties being incorporated companies.

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The record provided shows that on the date fixed for hearing, although the suit had been thrice stood down, to enable the appellant and/or its Counsel to appear, neither did so. In the event, the respondent's Counsel asked for judgment in default to be entered in favour of his client and an order was made accordingly. In doing so, the learned President was clearly acting within the ambit of her powers since both the appellant and its Counsel were absent. (See *Shaharudin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd.* [1982] CLJ (Rep) 747). This was on 15 September, 1982.

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Six days later, the appellant applied to set aside the default judgment under the provisions of O. 28 r. 8(1) of the Subordinate Courts Rules, 1980, which reads:

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Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.

However, at the conclusion of the arguments, and after having reserved her decision, the learned President dismissed the application with costs. It is from this decision that the appeal before me now lies.

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In her grounds of decision, the learned President had dealt with the explanation for absence offered by Counsel of the appellant with great care and concluded as follows:-

In the instant case, it was not apparent from a reading of Mr. Wong's affidavit why he was absent. He stated that he was indisposed and did not elaborate further. It was only on enquiry by the Court, that he stated that he did not attend Court because he had friends from Thailand visiting him. With respect, that is not a reason acceptable to the Court, and it would be setting a dangerous precedent to accept it. There must be a good many people who would prefer to be elsewhere when duty requires them to be in Court. In any case no application for postponement was made even though Counsel was present for a few moments. Had it been inconvenient for Mr. Wong to appear in the afternoon, he should have appeared punctually in the morning and asked for his case to be heard first. The Court would have been more willing to accommodate him.

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The defendants had been given every opportunity of being heard, to the extent that the Court stood down the case no less than three times to enable them to appear. This was not a case where either Counsel or the defendants had been absent due to some mistakes or oversight. They were not heard because they chose not to be heard on the day appointed for hearing and they did so at their own peril, since approval was neither sought nor given by the Court.

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I have no quarrel with the learned President, both as regards her reasoning and her conclusion regarding this part of the case.

In deciding the application before her, the learned President took into consideration, on the one hand, the well settled principle referred to by Sharma J. in *Pakrisamy v. Janagi* [1970] 2 MLJ 202:

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That every opportunity should be given to litigants to put forward their case.

and on the other hand, that referred to by Ali J. (as he then was) in *Safety Insurance Co. Ltd. v. Hua Seng Electric Co.* [1968] 1 MLJ 273:

That it should not be taken for granted that because a party has a good defence to an action, he can deliberately ignore the rule governing appearance.

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a In referring with approval to what Ali J. said, the learned President recognised that his Lordship was deciding a case governed by O. 19 r. 3(1) of the old Subordinate Courts Rules 1950, which required “good reason for absence to be shown” before a default judgment could be set aside, whereas no equivalent words appear in the current Subordinate Courts Practice. This view appears to find support in a dictum of Peh Swee Chin J. fin *Gan Kim Kiat Bros. Realty Sdn. Bhd. v. Leong Ah Kau* [1983] CLJ (Rep) 558 which reads:

b In practice any request or application to set aside a default judgment should normally be readily granted by the Court unless the plaintiff’s absence was either intentional or contumacious.

In my opinion, under the current Subordinate Courts Practice, whilst an explanation for absence is clearly relevant for the Court to consider in deciding whether or not to set aside a default judgment, it need not be a decisive consideration.

c What I consider however to be crucial in applications of this sort is whether there was **evidence** before the Court disclosing a *prima facie* defence to the plaintiff’s claim for possession or, in other words, a defence on the merits. For this purpose, the applicant need only disclose an arguable or triable issue: *Drayton Giftware Ltd. v. Varyland Ltd.* [1982] 132 NLJ 558; or, in other words, an arguable case which ought to go for trial.

d I am aware that some of older cases like *Farden v. Richter* [1889] 23 QBD 124, 129 say that where it is sought to set aside a regular judgment, then it is (**almost**) an inflexible rule that there must be an affidavit stating facts showing a defence on the merits.

But I much prefer the later House of Lords case of *Evans v. Bartlam* [1937] AC 473 which I believe to be the *locus classicus* on the point. Lord Atkin speaking for the House in that case enunciated the principles applicable thus:

e The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

f Accordingly, with Lord Atkin’s principles in mind, I scrutinised the record to see if there was **evidence** in the Court below disclosing a *prima facie* defence to the plaintiff’s claim for possession.

g In the instant case, a defence had been filed which averred that:

the defendant is the tenant of the premises at the monthly rental of RM324 for as long as the plaintiffs are able to acquire (?) a Temporary Occupation Licence and or the right to remain at the said godown from the State Government of Penang.

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In answer to the Court, during the argument, Counsel for the appellant explained that in support of this defence, the appellant would rely on an oral tenancy agreement allegedly entered into after expiry of a "Tenancy Lease Agreement" in writing dated 1 December 1973 for one year (p. 49/52).

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Elearly, wheter or not these was such oral tenang agreement was an issue of critical substance yet, there was no affidavit affirmed to by any duly authorised representative of the Appellant Company averring the alleged oral tenancy agreement. Instead, the only affidavit filed in support of the application to set aside the default judgment was that by Counsel for the appellant which contained precious little as regards the defence to the claim. All it said was this:

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I verily believe that there are merits in my client's defence and, amongst other things, the said Notice to Quit is bad in law and unenforceable.

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Presumably, the reason for this conclusion of law was the existence of the alleged oral tenancy agreement, as to which, Counsel could not possibly have any personal knowledge.

With respect, in matters where disputed questions of fact are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto: (See *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors.* [1985] CLJ (Rep) 575).

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In my opinion, therefore, neither Counsel's affidavit nor the statement of defence was **evidence** showing a *prima facie* defence within the meaning of *Evans v. Bartlam* (*ibid*). A trite point, perhaps, but a crucial factor which was overlooked all round both here and in the Court below.

On this ground alone (though the learned President did not rely on it) I was prepared to and did dismiss the appeal with costs. I also ordered payment out to the respondent of the sum paid into Court by way of security for costs of the appeal to account of its costs.

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In consequence, I made the same orders in seven other related appeals being, numbered 59, 61 to 66 of 1982, raising identical questions of fact and law.

Also found at [1985] 2 CLJ 97

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